THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

BETHUEL M. WEBSTER, *President* | PAUL B. DE WITT, *Executive Secretary* | ALFRED P. O'HARA, *Secretary*

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Association Activities

A RECEPTION for lawyers associated with the various Delegations to the General Assembly of the United Nations was held on December 1 under the auspices of the Committees on Foreign Law, and International Law. In addition to the members of the committees, the President, the officers of the Association, and committee chairmen received the guests.

TWO IMPORTANT and carefully prepared reports will be submitted to the Stated Meeting of the Association on December 9. James B. Donovan, Chairman of the Committee on Insurance Law will present his Committee's report on Problems Created by Financially Irresponsible Motorists. Since legislation on this subject will be introduced in the next session of the Legislature, it is important that the Association make clear its position. The Committee on Law Reform, George G. Gallantz, Chairman, will present its report on Consideration of New Methods to Select Judges. This report was circulated to the membership in October so as to give ample time for consideration of the far-reaching recommendations which the Committee has made. Other items on the agenda are interim reports from the following Commit-

tees: Committee on Criminal Courts, Law and Procedure, Harris B. Steinberg, Chairman; Special Committee on Improvement of Family Law, Richard H. Wels, Chairman; Committee on Taxation, John H. Alexander, Chairman; and Special Committee on the Unification of the Courts, Porter R. Chandler, Chairman.

MRS. MARY B. TARCHER, Acting Chief Attorney of the Legal Aid Society, met with the Committee on Legal Aid, Willis L. M. Reese, Chairman, and reported on several problems which she suggested the Committee consider during the current year. These problems included the power of the court to issue orders of protection, legal aid to persons in mental institutions, and the formation of a panel to handle matrimonial actions.

DURING THE summer the President and the Chairman of the Committee on Courts of Superior Jurisdiction, Albert R. Connelly, working with the Presiding Justice of the Appellate Division and the Justices of the Supreme Court in New York County, developed a cooperative undertaking to make available to the court and parties in personal injury cases the expert and impartial medical opinion of leading authorities in various branches of medicine. This undertaking is made possible by the combined grant to the Association of the Bar of the City of New York Fund, Inc., of $40,000 by the Alfred P. Sloan Foundation and the Ford Motor Company Fund to defray the expense of the program for one year.

The project is prompted by the dissatisfaction of the Supreme Court Justices with the conflicting medical testimony which is given by the experts retained by the parties and the need for having medical examinations and reports which are both authoritative and impartial. The system of employing partisan experts by the parties frequently results in exaggerating injuries by the plaintiff's experts and minimizing injuries by the defendant's

experts. Trials are prolonged with such controversy and the judge and jury are left without reliable medical guidance.

It is not the intention of the Justices to deprive the parties of the privilege of calling experts of their own choosing, but it is the desire of the Justices to make available to the parties and to the court and jury experts of both outstanding qualification and complete impartiality.

The program wil operate through the appointment by the New York Academy of Medicine of a panel of experts in the various branches of medicine. From this panel the court will make designations as required of specially qualified doctors who will make examinations of the plaintiffs in personal injury cases and report as to the nature and extent of the injuries. This report will go to the court and to counsel on both sides. If thereafter the case is tried the doctor will be subject to call at the trial. It is anticipated, however, that on the basis of the medical reports more cases will be settled.

Because of their distaste for hiring themselves out as partisan experts and because of the time which a court appearance consumes, the best qualified doctors have tended to stay clear of involvement in litigation. But leading medical men have indicated their willingness to respond to a call from the court and to aid in the administration of justice as impartial experts.

The doctors who will be called to this service will be compensated for their time in an amount fixed by the court in each case. The expense will not be borne by either of the parties, but for a year will be defrayed from the monies contributed by the Ford Motor Company Fund and the Alfred P. Sloan Foundation.

The program is jointly sponsored by The Association of the Bar of the City of New York, the New York County Lawyers' Association, the New York Academy of Medicine and the New York County Medical Society. An Advisory Committee has been established consisting of The Honorable David W. Peck, Presiding Justice of the Appellate Division of the Supremere Court for the First Department, The Honorable Bernard Botein, Su-

preme Court Justice, the President and Albert R. Connelly, Chairman of the Committee on Courts of Superior Jurisdiction, of The Association of the Bar of the City of New York, Edwin M. Otterbourg, President, and Thomas Keogh, Secretary, of the New York County Lawyers' Association, Dr. Howard R. Craig, Director of the New York Academy of Medicine, and Dr. Gervais W. McAuliffe, President of the New York County Medical Society. At the end of a year a public report will be made on the experience and results.

It is expected that trials will be shortened, that determinations of injury and damage will be more accurate, and that settlements will be facilitated and expedited through the use of this new machinery. If it proves to be as useful and effective as anticipated, the procedure should be adopted in other parts of the country and become a standard practice in court administration. It would then be carried on by some financial provision within the court system.

In announcing the inauguration of the program, Presiding Justice Peck said:

"The expert medical procedure, made possible by the public-spirited grants of the Ford Motor Company Fund and the Alfred P. Sloan Foundation, is a most promising innovation in the administration of justice. Judges have long been concerned about the unsatisfactory method of ascertaining the extent of injury and damage in personal injury cases on the basis of the conflicting testimony of partisan doctors who are retained by each side to support its claims rather than to give independent medical evidence. The system has not tended to bring into the court the best qualified experts and has tended to promote controversy rather than to resolve controversy in respect to injuries. The parties should be free to retain their own experts and offer their evidence if they wish. But there should be available to the court and to the parties the medical opinion of outstanding and independent experts who have no interest in the lawsuit and will give only objective and impartial testimony.

"Half of the time consumed in the trial of a personal injury action is spent on the presentation of evidence as to injury and damages. This part of a case can be materially expedited and the determinations rendered more accurate and certain, if in advance of the trial an examination of the plaintiff can be made by an independent medical expert and a report made by the expert to the court and counsel on both sides. Indeed, the probability is that with such an independent and reliable report more cases will be settled without the necessity of trial and battle of partisan experts.

"This undertaking represents the cooperation of two great professions in meeting a problem which is common to both and will be a great service to the administration of justice. It may well be a historic milestone in judicial progress and become a pattern for the court system through the nation. The Alfred P. Sloan Foundation and the Ford Motor Company Fund have our warm thanks for their public service contributions to enable us to make the experiment and study."

THE COMMITTEE on International Law, Dana C. Backus, Chairman, had as its guest Dr. C. Sluzewski, a member of the British Bar, who discussed with the Committee the formation of the new British Institute of International Law. The Institute would merge the Grotius Society and the Society of Comparative Legislation and publish a quarterly devoted to problems of particular interest to practicing lawyers. The Committee also developed plans for publicizing the Association's opposition to the Bricker Amendment, S. J. Res. 130, and reviewed some of the questions which would be discussed at the General Assembly of the United Nations.

THE ANNUAL National Inter-Law School Moot Court Competition, sponsored by the Committee on Junior Bar Activities, John Roberts Miller, Chairman, will be held on December 4 and

5 at the House of the Association. The question to be argued this year is whether an alien's attempt to own land escheats the land to the State, or whether the law providing for such an escheat is invalid under the due process or equal protection clauses of the Constitution and as being in conflict with the United Nations Charter. The teams which enter the final arguments will be the winners from twelve regional competitions in which over sixty approved law schools originally participated. The winning team will receive the Samuel Seabury Award, a silver bowl, and law books will be awarded as prizes in each round of the competition. The 1951 winner, the University of Arizona, and the winner of the award for the best brief, the University of Pennsylvania, will compete again this year. Again this year the contestants will be entertained by law firms at luncheon, and there will be a dinner for the participants and the judges of the final round. Judges for the final argument will be The Honorable Stanley F. Reed, Justice of the Supreme Court of the United States, The Honorable John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit, The Honorable Leslie Knox Munro, Ambassador Extraordinary and Minister Plenipotentiary for New Zealand, The Honorable Stanley H. Fuld, Judge of the Court of Appeals of the State of New York, David W. Peck, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York and the President of the Association.

For over three years the Association has cooperated with the American Broadcasting Company in producing the radio and television program "On Trial." On November 13 the Association and the American Broadcasting Company began a new series of programs which will take the place of "On Trial." The name of the new program is "Perspective." Each week a prominent figure will discuss the field in which he is an authority in terms of how it can best serve the modern world. Two or three lawyers will assist the guest in developing the discussion. On the opening

program of the series Lester B. Pearson, President of the United Nations General Assembly and Secretary of State for External Affairs of Canada, led the discussion on the United Nations and Korea. The other members of the panel were the President of the Association, Samuel M. Lane, Chairman of the Association's Special Committee on Broadcasting, and Dean Rusk, President of the Rockefeller Foundation.

An ingenious camera technique, coupled with an informal announcing style, is used to make the viewer feel he is an actual participant rather than a member of an audience. This technique, which is said to be an innovation for this type of program, was conceived by John W. Pacey, Director of the American Broadcasting Company Public Affairs Department. David M. Levitan continues as Program Consultant. "Perspective" is broadcast each Thursday evening from 9:00 to 9:30 P.M. over the ABC-TV network.

THE SPECIAL COMMITTEE on Atomic Energy, Oscar M. Ruebhausen, Chairman, at the invitation of the Director of the Brookhaven National Laboratory, met at Brookhaven the latter part of October. The Committee inspected the various installations of the Laboratory, including the hospital for studying the use of isotopes in treating various diseases. The Committee decided to continue its studies of the legal aspects of the use of atomic energy by private industry.

DR. ALFRED J. KAHN, Associate Professor at the New York School of Social Research, was the guest of the Committee on the Domestic Relations Court, Mrs. Sylvia Jaffin Singer, Chairman. Dr. Kahn reviewed for the Committee a study he has made of the Domestic Relations Court, which will be published in the spring by the Columbia University Press. Other matters discussed by the Committee were the visitation of the Court by members of the Committee and by auxiliary members of the Association, legis-

lative proposals recommended by Presiding Justice Hill, a project for enlisting the cooperation of the school system in a better understanding of the Court's work, and a forum, "Judges for Children," to be sponsored by the Committee in the spring.

THE COMMITTEE on Entertainment, Boris Kostelanetz, Chairman, has announced that the Annual Twelfth Night Party will beheld on January 6, and will be in the nature of a tribute to Judge James Garrett Wallace. Announcements will be mailed to the membership. The Committee will also sponsor a dance on February 13. The Annual Association Night Show is scheduled for the week of April 13. The Committee also announces that members interested in participating in the show as actors, stage crew or scenic designers should report to the House of the Association at 2:00 P.M. on January 24 for tryouts.

THE NEW YORK State Legislative Annual for 1952 is now available. This useful publication contains articles by department counsel and other experts on each major field of state legislation. The Annual also collects the memoranda of agencies recommending bills enacted, and the statements of the Governor on bills approved and vetoed. Reports of joint legislative commissions are included, and there is a well prepared index and a useful list of legislative documents.

The Calendar of the Association for December and January

(As of November 17, 1952)

December 2	Meeting of Section on Administrative Law and Procedure
	Meeting of Committee on Arbitration
	Dinner Meeting of Committee on Municipal Court
	Dinner meeting of Committee on Real Property Law
December 3	Dinner Meeting of Executive Committee
	Meeting of Section on Labor Law
	Meeting of Section on Taxation
	Meeting of Section on Wills, Trusts and Estates
December 4	National Moot Court Competition. Auspices Committee on Junior Bar Activities
	"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
December 5	National Moot Court Competition. Auspices Committee on Junior Bar Activities
December 8	Meeting of Committee on the City Court
	Dinner Meeting of Committee on Federal Legislation
	Dinner Meeting of Committee on Professional Ethics
December 9	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
	Meeting of Committee on Insurance Law
December 10	Meeting of Section on Corporations
	Dinner Meeting of Committee on Municipal Affairs
	Meeting of Committee on Patents
December 11	Meeting of Committee on the Federal Courts
	"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
December 15	Meeting of Library Committee
	Dinner Meeting of Committee on Medical Jurisprudence
	Dinner Meeting of Committee on the Domestic Relations Court

December 17	Meeting of Committee on Admissions Meeting of Committee on Foreign Law Meeting of Committee on State Legislation
December 18	Meeting of Section on Jurisprudence and Comparative Law "Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
December 22	Meeting of Section on Administrative Law and Procedure Dinner Meeting of Committee on Courts of Superior Jurisdiction
December 23	Meeting of Section on Litigation
December 25	"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
January 1	"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
January 5	Dinner Meeting of Committee on Professional Ethics
January 6	*Twelfth Night Festival.* Auspices Committee on Entertainment
January 7	Dinner Meeting of Executive Committee Meeting of Section on Labor Law Meeting of Section on Wills, Trusts and Estates
January 8	Meeting of Section on Taxation "Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
January 12	Dinner Meeting of Committee on Federal Legislation
January 13	*Lecture by Ernest Gross of the United Nations Delegation,* 8:00 P.M. *Buffet Supper,* 6:15 P.M. Meeting of Committee on International Law
January 14	Meeting of Section on Corporations Dinner Meeting of Committee on Domestic Relations Court
January 15	"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.

January	19	Meeting of Section on Administrative Law and Procedure Meeting of Library Committee Dinner Meeting of Committee on Medical Jurisprudence
January	20	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
January	21	Meeting of Committee on Admissions Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations Dinner Meeting of Committee on Foreign Law Round Table Conference, 8:15 P.M.—Hon. William J. Collins, Surrogate, New York County.
January	22	Dinner Meeting of Committee on Insurance Law Meeting of Section on Jurisprudence and Comparative Law "Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
January	26	Dinner Meeting of Committee on Courts of Superior Jurisdiction
January	27	Dinner Meeting of Committee on Municipal Affairs
January	29	"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
January	30	Annual Meeting of New York State Bar Association
January	31	Annual Meeting of New York State Bar Association

The President's Letter

To The Members of the Association:

The President's mail is heavy and interesting but consists mostly of expected items such as committee reports and announcements, invitations, an occasional complaint, &c. News that the Association had been abolished was not expected. In a recent letter to "Dear Mr. Ex-President," Porter R. Chandler reported that among the 50,000 corporations listed in the Secretary of State's proclamation as dissolved for failure to comply with Section 57 of the Membership Corporations Law he had found "Association of the New York Bar." He closed by saying, "Is this you?" The hastily verified answer was "No." The association referred to had been incorporated in 1851 (twenty years before we were organized) "for the promotion of *Legal Science*." (The president was one Daniel Bowly, about whom our historian would like to know more.)

In 1851 it was possible to speak of law as Science.* The upper case reference seems less apposite today, when we are engaged chiefly in activities partaking more of architecture, engineering, and management than of mathematics or physics or chemistry. Our current activities reflect the present emphasis: One day last month the Committee on Post-Admission Legal Education enter-

* "Nineteenth-century legal history-writing . . . did not think of a law which had always been the same but of a law which had grown. It sought stability through establishment of principles of growth, finding the lines along which growth had proceeded and would continue to proceed, and it sought to unify stability and change by a combination of historical authority and philosophical history. Utilizing the idea of authority, it sought to put a historical foundation under the seventeenth- and eighteenth-century theory of law as only declaratory of something having a higher authority than the pronouncement of legislator or judge as such. Law was not declaratory of morals or of the nature of man as a moral entity or reasoning creature. It was declaratory of principles of progress discovered by human experience of administering justice and of human experience of intercourse in civilized society; and these principles were not principles of natural law revealed by reason, they were realizings of an idea, unfolding in human experience and in the development of institutions—an idea to be demonstrated metaphysically and verified by history." Pound, *Interpretations of Legal History* (Macmillan, 1923), p. 9.

tained John J. McCloy, former United States High Commissioner for Germany, a member of the Association who ranks with Dr. Adenauer of Germany and Dr. Schuman of France as a designer of the New Europe. In his notable address to the Association, Mr. McCloy mentioned the lawyering required for the conduct of the Occupation and the drafting of the Schuman Plan. Another day the Committee on Criminal Courts, Law and Procedure entertained the Justices of the Court of Special Sessions and Magistrates. It was a social occasion, and a pleasant one, but it terminated in repetition by the Mayor of his pledge that he would not make a judicial appointment without consulting the Bar. This, also, is good lawyering; it is not basic research.

I could illustrate my point by listing a few of the committee reports that get tucked into my week end brief case. It can be demonstrated in fewer words, perhaps, by mentioning the articles in the November issue of THE RECORD—one dealing with legal planning to mitigate the consequences of atomic attack, one on the struggle of colleagues in Western Germany to uphold the rule of law, a review of a casebook on procedure and judicial administration. This is engineering, not Science.

I hope that many of our members will attend, and that a number will participate in, the discussion of committee reports scheduled for action at the December and January Stated Meetings. On December 9 there will be reports by the Committee on Insurance Law on "financially irresponsible motorists" and by the Committee on Law Reform on judicial selection. The Commercial Code recently adopted by the American Law Institute and the subject of comparative negligence in personal injury cases will be up for discussion on January 20.

BETHUEL M. WEBSTER

November 17, 1952

Germany and the New Europe

By John J. McCloy

Former United States High Commissioner to Germany

I wish I could adequately tell you how much I appreciate the honor of being asked to talk to my fellow members of the Bar of the City of New York and their friends. I have sat in this room on many occasions as a member of the audience and I have heard many distinguished lawyers, judges and statesmen speak. I have heard debates, elevated and otherwise, conducted here on important issues which affected city, state and national interests.

When I recall how critical and exacting those audiences were of the speaker and his effort, I am somewhat appalled to find myself addressing you, particularly under the auspices of the Committee on Post Admission Legal Education. It is quite enough to talk to you, but to be called upon to educate you is indeed alarming. To be asked to do so now, after a relatively long absence from the law is one of the incongruities which time frequently brings about.

I speak, therefore, with considerable trepidation, but it is nonetheless with a very warm and deep appreciation of the honor done me that I acknowledge your welcome to this House—this "Inn of Court"—which embodies so much of the tradition of the Bar of this great city.

During the larger part of the past twelve years, I have been away from New York and the profession. But through it all I have not felt very far removed.

It was in the late summer of 1940 when Henry Stimson asked me to come to Washington. You have all seen the fine bust of Mr. Stimson, my hero statesman, which stands in the hall of this building, and it may interest you to know that an exact replica

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Editor's Note: Mr. McCloy, a member of the Association, delivered the lecture published here under the auspices of the Committee on Post-Admission Legal Education, Parker McCollester, Chairman.

of that bust stands on the banks of the Rhine under the Drachenfels in a New England type chapel which was there recently dedicated in his memory.

Today Germans and Americans worship together in this chapel. It is but a short distance below the still standing pillars of the Remagen bridge whose crossing marked the final stage of the conflict Mr. Stimson did so much to bring to a successful conclusion.

Tonight in this building I sense the presence of his spirit and that of his stalwart lieutenant, his right arm, Bob Patterson. I return to the United States with both of them dead and at a period of our history when, with all their noble contributions to our victory, there exists even a greater need for their counsel, their character and their energy.

These two great figures were, however, only the more spectacular examples of the men that this Bar so generously contributed during the war and the post war period to the defense of the country and the welfare of the free world. Among the living are such men as Eddie Greenbaum and Foster Dulles, but as prominent as they are in the service they have rendered, other names rush to mind quite as readily. If I attempted to refer to them all tonight, this talk would become sort of an Homeric catalog of the ships rather than a narrative.

I remember so well how things transpired in Washington during the war years—and I see General John Hildring down in the audience he will confirm this—whenever there was an important, tough, down in the mud sort of a job to be done, too hot for uncertain quantities to handle, the cry would always go up, "Let's try to get somebody this time outside of New York. Don't always draw on New York lawyers."

So efforts were made and time was lost, and eight times out of ten a New York lawyer did turn up for the job because everybody knew he wouldn't have enough sense to quit work at ten o'clock at night, and that he had been made reliable by long contact with stiff and smart competition.

Moreover, you had to waste less time talking to him about his duty and all that sort of thing. Thus, many came, served and returned to their practice, frequently unhonored and unsung after the most distinguished and selfless contributions to our common welfare.

Now, I shall not attempt to deliver a lecture to you, or to give you a legal history of Germany during the past three years. I thought that you would be more interested if I talked to you quite informally about Germany, not exclusively as a country fraught with many problems, but of Germany's place in the new European community and the likelihood of the Federal Republic becoming a constructive force in that community.

The fact that we can even discuss such a question shows how far we have come in Germany since 1945. General Clay, I believe, has previously spoken here of the far-sighted steps that he took to reintroduce representative government in Germany, first, in local governments, and then at the national level.

Towards the end of his administration, the drafting of the new basic law and the other documents which formed the constitution of the Federal Republic was completed. This trail was first blazed and cut out by lawyers, and a good many of them were New York lawyers, among the most notable of them perhaps being such men as Goldie Dorr, Tracy Voorhees and Fritz Oppenheimer, who I see in this audience. These men, with Charles Fahy and others, working closely with the leading German political figures, laid a very solid basis for future progress.

There have been many other subsequent undertakings which deeply affect the economic and political future of the new German state: the deconcentration of the major German industries; the drafting of legislation attendant upon the monetary reforms; the setting up of the banking system; the regulations in regard to trade; the drafting and revision of the occupation statute; the Marshall Plan agreements; and, finally, the recent drafting and negotiation of the so-called contractual agreements which, in effect, are treaties of a most far-reaching character.

By these, German sovereignty is restored to the new government in all essential particulars, except for the area in which we had to preserve our position and that of Germany as against the Soviet Union, pending a final settlement of the German boundaries.

Of course, all these great political and economic steps were attended by important legal steps. Practically speaking, the lawyers operating on the staff of the Military Government and the High Commission had to run the whole gamut of legal experience: the laws of war, constitutional law, legislative drafting, anti-trust work, negotiations, court work, both trial and administration, criminal law, administrative law, domestic relations—name all phases, name all procedures, and I think it would be difficult to specify a field which was excluded from their experience.

All in all, the economic and political rehabilitation of Germany has been spectacular. On the economic side, the progress of the country has been almost unbelievable. A steady currency, a high production index—much higher than that of the pre-war period, a very high export ratio and, considering the tremendous influx of refugees, a relatively small number of unemployed, are some indications of the extent of the German economic recovery.

On the political side there is now, from county to national level, a thorough-going representative system of government based on a constitution and laws of modern and democratic character. I do not mean to say that the new democratic state does not face serious political problems and some real dangers. Obviously, there are still not inconsiderable forces which would revive the old authoritarian pattern, if they felt they could. I have no doubt that anti-democratic forces will some day try again to bring their influence to bear. The winds will centainly blow upon the new house, but the walls are growing firmer each year.

One certainly cannot judge the progress of the new German state by the sporadic outbursts of some frustrated nazi whose utterances are usually overplayed in the foreign press. The

prospects, in my judgment, are good for the development of a democratic Germany within the European Atlantic community.

There are so many facets to the German situation that I find I have the greatest difficulty in selecting those in which I feel you would be particularly interested. Passing over many others of perhaps equal interest, I have decided to speak briefly of three specific problems of significance in Germany, and I hope of interest to you. They are the problems of restitution of property and compensation for the nazi persecutions, the subject of war criminals, and the deconcentration of industry. The last will lead us directly, as I shall point out, to my main theme—Germany's position in the European community.

The American authorities from the first days of the occupation pressed for adquate forms of restitution to the nazi persecutees, and I think it is fair to say that legislation in our zone on this subject carried the program farther than in any other zone, though recently the system has been generally made uniform throughout West Germany.

The Adenauer Government, with the support of the Social Democrats, the chief opposition party, has not only conformed to this principle, but to some degree gone even farther to bring about a real measure of restitution to the nazi victims.

The present leaders of Germany acknowledge that it is, of course, impossible to make restitution as a moral or a practical measure for the hideous wrongs of which the Hitler regime was guilty. It is a contradiction in terms to speak of taking credit for restitution programs of this sort. Yet, in justice to the government of the Federal Republic, I think the extent to which efforts have been made should be recorded.

To date about $190,000,000 worth of tangible properties have been returned to persecutees in the United States zone under rather drastic laws which permit the original owner to penetrate intermediate transfers of title. When the program is completed, I should imagine that this figure would be something around $250,000,000 for the zone. Progress in the British zone is now

under way and there the value of the returned property under the Persecutees' Act will probably exceed that of the United States zone. In the French zone, similar restitution laws have now been enacted. Though I do not have the statistics for that zone, I should say that properties whose value will constitute a substantial figure, though somewhat less than that of either the British or the American zones, will be returned.

In addition, the Federal Republic has undertaken to pay a restitution judgment against the Reich itself up to about $357,000,000. Under the General Claims legislation, as distinguished from the Return of Property legislation, as of August 31, 1952, the victims of Nazi persecution have received compensation benefits and payments amounting to about $36,000,000. The complete program will involve a total payment of about $130,000,000 in the United States zone, and for all western Germany I should estimate that compensation in the amount of about $300,000,000 would be paid under this legislation.

Another important step in restitution has been taken. The Federal Government has agreed to pay the State of Israel in the form of goods and services over a period the sum of $822,000,000. This program is due mainly, if not exclusively, to the initiative of Dr. Adenauer. This sum is divided into two parts—$715,000,000 will be paid to and will stay in Israel as a contribution to the support of that country, so many of whose expenses are so directly attributable to the need for finding a place of refuge for the many expellees driven from their homes by nazi excesses. The balance of $107,000,000 will be paid to Israel, but in turn will be allocated by Israel to the Jewish Conference on Material Claims which is representing the Jews outside of Israel, mainly those in the United States.

As a rough estimate of the total amounts involved, I should say that the total to be paid to persecutees of the nazi regime will amount approximately to two billion dollars, which is not an inconsiderable sum considering the many other burdens which the new German State is finding it will have to bear.

I mention this restitution program for it has not been largely publicized, yet the very substantial opinions which have supported it import, I think, real significance in our appraisal of the future course of the German State.

I think it is only fair to look to that as well as to the last utterance of some disgruntled figure who may make an impassioned address in some remote corner of Germany as we appraise the trustworthiness of the new German State.

The subject of German war criminals has provoked, I am told, a substantial interest among the members of the New York Bar, and particularly my action in dispensing acts of clemency among certain of these criminals has, I have learned, provoked some questions, if not criticism.

First, let me say that no one who has not himself made a study of these cases, and to some extent read the record of these cases, can have any conception of the magnitude and the horrible nature of the crimes which were committed and proven in the courts established at Nuremberg. A display of these crimes in the form of a trial was essential, to my mind, if we were to be consistent with the broad objectives for which we fought.

With Mr. Stimson, I had been instrumental in paving the way for the trials that were conducted at Nuremberg. I supported and still adhere to the principles which he laid down and which so largely governed the policy of the United States Government in connection with these war crimes trials. I have the highest regard for the manner in which the trials generally were conducted. The work of Mr. Justice Jackson and Mr. Telford Taylor and their staffs were of a high order.

In looking backward, I wish we had been able to erect tribunals not composed exclusively of the victors, but I am aware of the difficulties which were in the way of bringing this about. I say this not because I think the tribunals would have reached a more just result, but differently constituted they may have gained for the judgments a wider popular acceptance.

It was not, therefore, because I had any doubts as to the sound-

ness of the fundamental principle on which the trials were conducted or because of doubts as to method that I felt impelled to grant clemency.

When I arrived in Germany, fifteen prisoners, convicted at Nuremberg, were standing under sentence of death, subject to my jurisdiction on matters of clemency. Under the jurisdiction of General Handy, the then Commander in Chief of the European Command, another thirteen war criminals likewise were under death sentences. A large number of convicted criminals had been executed prior to my assuming office. I am not sure for the moment of the exact figure, but it was around 275.

Those remaining in prison had, in the main, been under sentence of death since early in 1948. Many petitions for clemency had been filed meanwhile, actions in the United States domestic courts had been instituted in regard to a number of the criminals, and Congressional investigations had intervened. All of these factors had an effect in staying the carrying out of the sentences.

Soon after I became High Commissioner, I was advised by my counsel that in certain cases a review had shown that some clemency might well be extended. A study of these cases and the general situation forced me to conclude that a general review of all the cases subject to my jurisdiction should be undertaken whether the sentences involved were for death or for some lesser punishment.

I appointed a board in March, 1950, composed of the Honorable David W. Peck, whom you know as the Presiding Justice of the Appellate Division, First Department, of the New York Supreme Court, as Chairman; the late Commissioner Frederick A. Moran, of the New York Parole Board; and Brigadier General Conrad E. Snow, a legal adviser of the Department of State, whom I had known with high respect since law school days.

I asked this board to make recommendations to me and they set about their work expeditiously and thoroughly. By the end of the summer of 1950 they submitted to me their recommendations in the form of a written report. I studied this report very care-

fully and I went over each case myself, with the result that I commuted ten of the death sentences and reduced the sentences in a number of other cases where imprisonment had been imposed. I was satisfied that in one or two capital cases, the defendant involved, on the basis of proof submitted to us, was wholly innocent, or at least, if not innocent, clearly had been erroneously convicted. Where I found any basis for clemency, I was prone to grant it, particularly in the death cases.

As for the balance of the commutations, they were based mainly upon a desire to make uniform the substantially varying sentences which were imposed by the different courts.

I published my findings and the general report of the Clemency Board. General Handy, after a very prolonged review of his cases, commuted eleven of the death cases that were subject to his jurisdiction, and he likewise made adjustments in a number of the remaining sentences. Altogether, seven of the death sentences were carried out.

Although the entire subject is a most sensitive one in Germany, I think I can say objectively that the publication of the Board's report and the decisions, together with certain other data respecting the criminals in the trials, did much to produce in Germany a wider acceptance of the Nuremberg trials than had theretofore existed.

I have heard the late Governor Smith say that the most difficult thing that he ever had to deal with as Governor was the soul searching task of considering capital cases. I can well understand what he had in mind.

With the coming into effect of the contractual agreements, provision has been made for a mixed board to be erected, composed of Germans and Allies, which can carry on the jurisdiction over clemency appeals.

Now, there are two further matters in regard to these cases to which I might refer. One is in respect to the charge levelled by certain omniscient commentators that my decisions, to the extent that they resulted in any commutation of sentences, were due to

political considerations. This charge arose, I believe, because my decisions were announced at about the time the question of German contribution to the military defense of Europe was under contemplation or being proposed at the Brussels Conference.

I do not think I need reassert the fact that the sole considerations which prompted my decisions are stated in them. I might point out, however, that the recommendations of the Board, which I followed in all but a very few instances, were rendered long before any thought of German military participation was contemplated, and my own studies had been largely concluded before that time as well. Unfortunately, the time spent in checking records, preparing material for printing and the like caused a delay in the publication of the decisions until after the matter of the German military contribution had been publicly discussed. I gave no clemency to any officers whom I felt had actively participated in carrying out the extermination orders of Hitler, which clearly had no possible connection with any military consideration. I did commute the sentences of some officers who had balked at such orders. I may say at this point I was surprised in looking over the record—I had heard a great deal about duress and how one could only expect himself to be liquidated if he had opposed some of these frightful orders—to see that the record did not bear out a defense of duress. There were a number of instances where a German officer would take a position against these Hitler decrees, and either nothing happened to him or some relatively light sanction would be imposed—his promotion was held up, or he was sent to some other area, but the record at least that I have read, not only in the cases of the soldiers but in the cases of many of the concentration camp people, where someone balked, his action was not followed by his liquidation. To be sure, he may not have been given the preferment that he might otherwise have hoped he was going to receive, but it did not result in his demise.

A number of very high officers, including two Field Marshals, still remain in prison under American jurisdiction. The cases of

Kesselring and Mannstein, which have recently received some publicity, are not under United States jurisdiction.

The other matter relates to the confiscation of the Krupp properties, a subject of rather lively interest.

When I took up the review of the cases I found there was a confiscation element in the judgment attached to the term of years sentence of Alfred Krupp, the convicted son of the firm's head, Krupp von Bohlen, whose illness and death had prevented his trial. Justice Jackson had originally opposed, as repugnant to our judicial system, authorization for the general confiscation of property as an item of punishment in connection with the International Military Tribunal, and General Clay had previously modified the absolute form of the judgment in this respect. The decree against Krupp was the sole case of confiscation against any defendant handed down by any of the Nuremberg courts. Even those guilty of personal participation in the most heinous crimes did not receive such a sentence, and several industrialists, whose responsibilities I felt were far greater than this particular Krupp's had been in the management of their respective properties, had not received such a sentence.

Doubtful of its legality, I was convinced of its discriminatory character against the defendant, as I felt it was unjustified by any considerations attaching peculiarly to him. Accordingly, I eliminated that feature of the decision.

But at the time the clemency action was taken, it was stated that the remission would not affect the application of the deconcentration provisions of the Allied High Commission Law No. 27 in respect of the Krupp interests. The record will show that the deconcentration program was vigorously and effectively pressed in respect of the Krupp holdings as well as of the other coal and steel interests falling under that law.

In connection with Krupp, deconcentration had resulted in the filing of a plan under which Krupp will put the stock of the steel producing company, the second largest of the deconcentrated plants of the Ruhr, on the market for sale, along with the shares

of the independent coal producing companies which are to be separated from both the Krupp interests and the control of the steel company.

The plan also contains an undertaking that Krupp will not return to a controlling position, through ownership or otherwise, in those industries, and that the plan for bringing diversified small industries to the dismantled Essen properties will be continued. The Krupp family council will be dissolved with the division of the residual assets among the members of the family.

Thus, although Krupp has not been deprived of the usufruct of his property, his property rights have not prevented the effectuation of the basic policies of the Allies in Germany. None of this, of course, will be convincing to those who are interested in Krupp as a symbol, but it may, however, convince those who are interested in the realities of our policy, that there has not been any studied softness, but, on the contrary, an attempt to carry through a consistent program designed to deal with the real problems proposed by the concentration of power in the Ruhr.

I have taken pains to spell this out at some length because some articles have appeared, particularly in English publications, with rather unfortunate insinuations that show a deep ignorance of the facts of the case. I understand that a question might be raised in Parliament on this matter, and I hope and believe that if it is raised and pressed, the matter will be put straight. In the discussion, if it occurs, I hope the English recall that they had jurisdiction in the Ruhr area, it being in their zone; they passed up the right to try Krupp if they wished—indeed they avoided putting any industrialists on trial and they took little part in pressing for the deconcentration of the Ruhr industries. We did. Moreover, I was advised definitely at the time that they would not feel bound by the confiscation degree of the American court in the Krupp case in their zone, where, of course, the major Krupp properties were to be found. We had a relatively small amount only in our zone. In the light of earlier English indifference, I find it difficult to follow certain of their present criticisms.

I could naturally spend more time on the matter of deconcentration and decartelization. It has always been a cardinal element of American policy that the great Ruhr industries should be deconcentrated. The breakup of the *Vereingite Stahlwerke* and other great Ruhr combines was particularly in the minds of our policy makers. We did not splinter them, but they were reduced to units roughly comparable to other similar going concerns in France and Luxembourg.

Our efforts were also directed against the joinder of the steel and coal properties and the continued existence of the exclusive sales monopoly. We also set about the deconcentration of the great I. G. Farben complex. This was divided into three separate companies: Leverkusen, Hoechst and Ludwigshafen. The so-called Grossbanken were broken up into nine regional banks. In the motion picture industry, we did not do much more than separate it from national control.

I think I can say that though the Germans are not so much imbued with the principle of divide and complete as are we, there is a substantial element of opinion in Germany which feels that some deconcentration of the larger industries, particularly in the coal and steel fields, is beneficial.

As I have said, we always endeavored to leave standing a good competing unit, and I believe in this we have been successful, both in the chemical industry and in the coal and steel industries. We have effected the separation of coal from steel to the extent that no steel company is permitted to have more in the way of captive mines than 75 per cent of its needs. Anti-monopoly laws are in effect and I believe even after full freedom in this field is given to the Germans, there will remain on the German books some such laws, although they may not go as far as ours.

In working out deconcentration in the steel and the coal industries, we were heavily supported by the French. While we were in the middle of our deconcentration efforts, the French proposed what has come to be known as the Schuman Plan, whereby all European markets of those countries participating

in the plan were to be open and the combined steel and coal resources were to be pooled and governed in certain vital respects by a supra-national authority.

This proposal immediately elevated our discussions in regard to German deconcentration from the national to the international level. This was an example of the tendency to seek a solution for all major problems on a European rather than a national basis. For almost imperceptibly, but nevertheless steadily, we found ourselves dealing with Germany not as a separate entity, but as a part of the larger European community.

And that brings me to the main point I want to make this evening. The Allied High Commission, representing the British and the French and the United States, which carried on negotiations with the Germans and in many areas worked out common problems together with the Germans, was in itself symbolic of community of effort rather than of individual national interests. As its work was a prelude to the development of an even wider approach to the solution of German problems, I might refer briefly to the Commission and some of the personalities connected with it.

Our decisions, except for those which were particularly within our respective jurisdictions, were of course tri-partite. When one considers the contentious character of so many questions in regard to Germany, I think one can look at the record of the High Commission in Germany and find in it solid evidence of equitable compromise and constructive progress.

To be sure, there were differences in the Commission, but to the substantial extent that the Commission was itself given a free hand to deal with controversial issues, there were few deadlocks.

That the work was smoothly conducted is largely due, I think, to the personalities that were involved. Sir Brian Robertson, who had been the British Military Governor, was the first British Commissioner. He was a son of Field Marshall Robertson, "Robbie" of World War I fame, and he himself was both a statesman and a soldier. He had served in the African and Italian

campaigns with Alexander and with Montgomery, and he had been a close colleague of General Clay's through many difficult periods of the German early occupation, including the air lift.

In the Commission, he presented his facts and his argument as crisply and pungently as a highly trained advocate. A bit austere on first acquaintance, one soon came to know his very real human qualities.

Sir Ivone Kirkpatrick, a wise and far seeing Irishman of great objectivity and eminent good sense, succeeded General Robertson as the British Commissioner. A senior member of the Foreign Office, he spoke German fluently and he had had wide experience with German problems. Indeed, he had carried the briefcases for Chamberlain when Chamberlain made his trip to Canossa in the shape of his voyage to the Petersberg high up on the seven hills that mark the Rhine Valley at this point. As the Petersberg became the site of the High Commission and as the Dreesen Hotel across the river, which had been the site of the actual conferences with Hitler in 1938, became the site of the French High Commission, we were constantly reminded of the history of the recent past as we held our deliberations along the Rhine.

Monsieur Francois Poncet, the French Commissioner, was a genial and delightful companion; deft, scholarly and experienced. He had been imprisoned in Germany during the war. He is a profound authority on Goethe; he speaks and writes German almost as brilliantly as his native French. He will shortly be called upon to deliver the eulogy in the French Academy on Marshal Petain, whose former seat he will there occupy. I cannot wait to read his speech upon this occasion, as one may be sure that it will be a keen analysis, brilliantly expressed, and a masterpiece in the avoidance of pitfalls.

But I am not emphasizing inter-Allied cooperation as such. I am pointing to the fact that as the work went on, all the important problems of Germany emerged as European problems, which had largely to be solved in the European framework.

As I have said, the deconcentration program led into the Schuman Plan, a European concept. Our lawyers, and in this category I would include myself, did almost as much work in Paris as we did in Frankfurt or Bad Godesberg; with Hallstein for the Germans, Monnet for the French, together with Pleven and Schuman, and the political and economic ministers of the low countries in frequent attendance.

No sooner were we making progress with the Schuman Plan, when the Korean attack pushed to the fore the question of collective defense. The problem immediately arose as to how one could establish a reasonably adequate European defense system, including Germany, which would not result in the revival of German militarism. The answer again was a European community.

Charters and statutes had to be drawn. Infinite patience had to be displayed in the negotiations. To be sure, the main decisions were made at the Foreign Ministers' conferences, but the way was being constantly pointed to by the sheer exigency of the day to day decisions that had to be made in relation to Germany.

Out of the European defense community, there immediately evolved the necessity for some better political form which could give the defense community a more definite purpose. Although the Germans were permitted free and independent representation at these European discussions and negotiations, Americans, by common consent, were almost invariably participating in them, partly because of our direct support to the European defense community and partly because of our economic and military aid. Above all, the European parties involved, groping for new forms, constantly sought the advice and help of American lawyers who they felt could give them advice and counsel growing out of American constitutional history. I am very glad to say that the entire United States Commission staff, and particularly the lawyers on it, took a most active part in this work and are still doing so.

There is no doubt in my mind whatever that in spite of

frustrations, in spite of setbacks, in spite of heavy layers of mistrust, the people are seeking a solution of this European economic and political problem in forms of new constitutional and economic bodies embracing all interests. At the moment, the progress may be confined largely to intellectual and governmental levels, and it remains to be seen how far public sentiment will support it.

But although it is always dangerous to use historical analogies, bear in mind that it was in the intellects of men such as Madison, Monroe, Jay and Hamilton that the American constitutional form was evolved.

The European nations, in their search for a community, have an infinitely more difficult problem to solve than that which faced our colonies. Yet the overpowering weight of Soviet Russia forces the free nations of Europe to come together politically, economically, even spiritually if they would survive in freedom. Slowly, under the pressure of a situation that cannot be changed, the European nations are moving together. That is the trend, despite all disappointments.

As the events of recent months have evidenced constantly, progressive steps are being taken. The Schuman Plan, the European defense community, the European constitution—they are all part of a grand scheme.

I do not wish to elaborate unduly on the European concept. The need for the European community within a larger Atlantic community appears obvious. It is recognized in many significant circles. Now, what are the major obstacles in the way? They center on old Franco-German fears and suspicions, as evidenced by the current failures to adjust the Saar problem.

In Germany, Dr. Adenauer has had and seems to continue to have the heavy opposition of the Socialist Party, which has given little evidence of pro-French tendencies. The Socialists carry the heritage of the late Dr. Schumacher and on foreign issues they seem to tend to national rather than international solutions.

In France, there is hesitation to follow through with the con-

sequences of their own proposals, such as the European defense community. France fears a strong German military contribution and German domination within the European defense community, particularly in light of the burdens she has to assume in Indo China.

We Americans, as well as the British, can well understand French preoccupations and French fears. The United States and Britain are strongly linked to France by common democratic faith. And they have stood firmly and will continue to stand firmly at the side of France. We can understand French hesitation, but now France should understand that the time has come when decisions must be made.

Today Germany is demonstrating what I believe is a sincere will for association with the West. If she is not allowed to enter a European Atlantic community with its responsibilities, safeguards and ties, she will go the old way of independent nations, perhaps seeking other associations, and France will face far greater dangers. Inside the European community is the best hope for the ending, once and for all, of the old Franco-German rivalry.

One thing is certain. There can be no European community; there can be no sound collective defense system; there can be no solid hope for the future of Western Europe unless France and Germany work out a solid rapproachement.

I have come to doubt that France and Germany alone can work out a permanent solution. I can see no hope unless the solution is found, with our help and that of other nations, in terms of a European community. In that community France and Germany must be equal partners. There can be no divisions or alliances within the community.

To be sure, Germany with her industry and her resources, is bound to be a very strong element in it. In spite of this, I do not subscribe to the view that Germany would dangerously dominate any such organization.

The strength of France is greater than she is disposed to admit.

With her iron deposits, her maritime interests, her abundant food supply, she has one of the best balanced economies in the world. She still suffers unfortunately, from the demoralization brought about by the sudden collapse of her armies in the last war and by the German occupation; but with her industry comparable to the German's and with resolution, I am confident she need no longer take counsel of her fears for with comparable industry she can hold her own.

Moreover, the various organizations, including the military, within the European community, are so set up that although they are not final guarantees, they do make it very difficult for one nation to dominate the other within the community.

But it is not contemplated that the European community should stand alone, for it would become a part of the greater Atlantic community, in which Great Britain and the United States are solidly represented.

And certainly Germany, however strong she may be, will not be in a position to dominate such a community. But perhaps after all the important thing is not so much whether she can dominate, but whether she will attempt to dominate.

Here we come to the basic question which I touched upon earlier. France, Britain and the United States and other nations are asking: Will a rehabilitated Germany undertake another aggression? Will she be guilty of practices which brought about such disaster to herself and the rest of the world? Or can Germany be trusted? If the answer is "Yes," then the European community can go forward. I am not in a position to give you guarantees. I can give you an appraisal only.

At the beginning of this talk I said that I believed Germany had made some strong starts on the road to a democratic, peaceful state. I believe a large majority of the German people adhere to the representative form of government.

Now, what about the Nazis and the stories about their return to power?

I do not mean to minimize the dangers when I say that the

likelihood of an active Nazi takeover of the country is small. Partly due to the defeat, partly due to the unexpressed sense of guilt or shame over the Nazi excesses, the vast majority of the German people today renounce Nazism and they display no eagerness for a new military role. The sporadic statements of individual Nazis or groups, which are picked up and emphasized by the foreign press, including our own, are rarely followed by a report on the reactions of the German Parliament, press and people to such utterances.

It was only a short time ago that the S.R.P., the Social Reichs Partei, was generally considered to represent a serious attempt at Nazi revival and was played up as such. Today that party is dissolved, and there is a decree of the constitutional court declaring its existence illegal.

Gradually the strength of the center is being consolidated. The Federal and State governments throughout Germany are, generally speaking, in the hands of people who were activists in the resistance or were connected with the Weimar Pepublic.

Considering the large number of people who did adhere to Nazi doctrines and who were prepared to take and exercise power under that regime, the authoritarian danger is never entirely removed from men's minds in Germany and it should not be from ours. The recent SS meeting at Verden was not a pleasant affair. As I have said, I have no doubt that at some time in the future, the winds will again blow on the House of Representative government in Germany. But the lessons of the past, the growth of public and private democratic institutions, the distaste for military service as such—a new thing in German life—the determination to live in freedom gives solid hope that any new storms will be withstood.

In short, I believe that the representative form of government has a better chance to survive than it has ever had before in Germany's history. And the best guarantee would be German participation within a European Atlantic community, for within the community Germany would have a much reduced impulse to

go off on a frolic of her own. Within the community the liberalizing influences of the French and European spirit generally would play on the German people. The Germans would have wider horizons, which is what they sorely need, more friendship, stronger hope.

Thus, I believe the European community is the answer to the old rivalries of Europe. Moreover, it is within the larger European Atlantic community that the answer to the Soviet threat lies, and it may be that within it also lies the seed of the solution of the East-West tensions.

Above all, the European community is a positive concept. Within it the old boundaries lose their significance. The European spirit will again have a chance to flower as it did in centuries gone by. And the free world will regain strength and sustenance from it.

Review of Recent Decisions of the United States Supreme Court

By MARVIN SCHWARTZ and EDWIN M. ZIMMERMAN

SANFORD V. KEPNER

(November 10, 1952)

After respondent had applied to the United States Patent Office for a patent, petitioner filed a similar application making the same claim. A board of interference examiners determined after hearings that respondent held priority of invention and accordingly denied petitioner's application for a patent and granted respondent's application. Petitioner thereupon proceeded in the District Court pursuant to Rev. Stat. § 4915, 35 U.S.C. § 63 (1946 ed.), which provides, in part, that

> ". . . whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant . . . may have remedy by a bill in equity . . . and the court . . . may adjudge that such applicant is entitled, according to law, to receive a patent for his invention. . . ."

Petitioner asked in the District Court for a judgment that he was entitled to a patent and for a judgment that respondent's claims were unpatentable on the basis of prior invention.

The District Court upheld the Patent Office's determination of respondent's priority and, since this was enough to justify denial of petitioner's application for a patent, refused to consider the validity of respondent's patent. This judgment was affirmed by the Court of Appeals for the Third Circuit. The Third Circuit decision was in accord with decisions of the Sixth Circuit, but in conflict with decisions of the Seventh and the District of Columbia Circuits.

A unanimous Court, in an opinion by Mr. Justice Black, held that a district court acting under Rev. Stat. § 4915 exhausts the relief it may give when it holds that the unsuccessful applicant is not entitled to a patent. The district court may not in proceedings brought under Rev. Stat. § 4915 "adjudicate patentability at the instance of one whose claim is found to be groundless."

UNITED STATES V. L. A. TUCKER TRUCK LINES, INC.

(November 10, 1952)

Appellee opposed before the Interstate Commerce Commission an application for a certificate of public convenience and necessity to authorize

extension of an existing motor carrier route. The application was heard by a hearing examiner and his recommendation that the certificate issue was ultimately approved by the Commission. Appellee, on the ground that the evidence did not show the need for additional transport service, petitioned the District Court to set the certificate aside.

Before the day appointed for hearing in the District Court, the Supreme Court held in *Riss & Co. v. United States,* 341 U.S. 907 (1951) that hearing examiners on applications for certificates of convenience and necessity under the Interstate Commerce Act must meet the requirements laid down in Section 11 of the Administrative Procedure Act, 5 U.S.C. § 1010 (1946 ed.). Section 11 provides, among other things that examiners "shall perform no duties inconsistent with their duties and responsibilities as examiners." Appellee then moved on the day appointed for hearing for leave to amend its petition to raise for the first time the contention that the commission's action was invalid for want of jurisdiction because the examiner was not qualified under Section 11 of the Administrative Procedure Act. This contention was accepted by the District Court and the Commission's order invalidated, despite the Commission's claim that in about 5,000 cases commenced after the effective date of the Administrative Procedure Act, orders would for an indefinite period be vulnerable to attack if no timely objection during the administrative process is required.

On direct appeal, the Supreme Court reversed on the ground that the claim of procedural defect had not been timely raised. Mr. Justice Jackson stressed for the Court that appellee made no claim of having been actually prejudiced by the conduct or manner of appointment of the examiner. The Court noted, also, that in this particular administrative proceeding, the Commission which appointed the examiner did not institute the proceedings or itself become a party in interest.

Appellee contended that it would have been pointless for it to raise before the Commission the question of the hearing officer's qualifications in view of the Commission's then firm policy of overruling such objections. Repetition of objections, the Court replied, may lead to a change in policy or at least put the Commission on notice of the accumulating risk of wholesale reversal being incurred by its persistence.

Likewise unavailing was appellee's contention that defects in the appointment of hearing examiners were in *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950), held to be of jurisdictional magnitude since in that case the Court held that such a defect in deportation proceedings could be attacked collaterally by writ of habeas corpus. The question of timeliness, the Court noted, had not been raised by brief or argument in *Wong Yang Sung,* nor was it discussed in the Court's opinion: the case is not, therefore, a binding precedent on that point.

Mr. Justice Douglas and Mr. Justice Frankfurter dissented separately. To both of them the question was not whether the defect ousted the Commission of "jurisdiction." To Mr. Justice Douglas, the Court's decision "gives a capricious twist to the law" in view of the holding in *Wong Yang Sung* that

a defect of the type in question vitiated the proceedings. To Mr. Justice Frankfurter, the provisions of Section 11 of the Administrative Procedure Act are not "personal to a party" but place "unwaivable limitations" upon the power of administrative agencies. And should the Court's decision have the effect of reopening cases which the Commission thinks should remain closed the remedy lies with Congress.

FEDERAL POWER COMMISSION V. IDAHO POWER COMPANY

(November 10, 1952)

The Court in this case had occasion to examine and comment upon the basic regulatory schemes envisaged by the Federal Power Act. The Idaho Power Company had applied to the Federal Power Commission for a license to construct, operate, and maintain a hydroelectric project which included a dam, a power plant, and two transmission lines on United States lands. The Federal Power Commission authorized the project on condition that the Company permit the interconnection of United States transmission facilities and carry power generated in Government power plants in such amounts as would not unreasonably interfere with the Company's use of its lines, the United States to pay for the power transmitted.

On petition for review of the Commission's order, the Court of Appeals for the District of Columbia Circuit held that the Commission lacked authority so to condition the license and remanded the case to the Commission for the entry of a new order conforming to the court's opinion. On motion for clarification of the judgment, the Court of Appeals entered a new judgment which itself modified the Commission's order by striking the condition, and affirmed the order as modified.

On petition for certiorari the Supreme Court, Mr. Justice Douglas writing, reversed. Justices Burton and Clark did not participate; the other Justices joined in the opinion of Justice Douglas.

The petition for certiorari had been filed more than 90 days after the original judgment of the Court of Appeals but less than 90 days after the amended judgment. The initial question for the Court was that of the timeliness of the petition. Had the second judgment merely restated the original one, time was to be computed from the latter and the petition could not be considered. Justice Douglas reasoned, however, that under the first order, the Commission could either issue the license without the condition or decline to issue the license at all. The amended judgment made such an exercise of discretion impossible and in effect decided that the license was to issue without the condition. This was an usurpation of the administrative function and went beyond the initial judgment. Hence, the petition for certiorari was timely.

Going to the substance of the case, the Court analyzed the Federal Power Act and rejected the contention that Congress had not granted the Commission power to condition a license for use of public lands by requiring a

public utility to interconnect with United States transmission facilities and to carry United States power. The court below had relied upon a restrictive provision in the Federal Power Act, §201 (f), which stated that "No provision in this Part shall apply to . . . the United States . . ." Justice Douglas emphasized that the "Part" referred to in §201 (f) was Part II of the Act which dealt with the control of the transmission of electric energy in interstate commerce. The authority which the Commission attempted to exercise in this case, however, was under Part I of the Act and the restriction of §201 (f) did not apply. Part I undertook to regulate the use of public lands and navigable streams—an older and different exercise of authority than that over public utilities engaged in interstate commerce. Unlike Part II, Part I had no provision specifically authorizing the Commission to direct interconnection. But Justice Douglas drew from several provisions in Part I support for the Commission's action. Not only with the Commission authorized in Part I to issue licenses for the construction of power projects on public lands, but, under §6 of the Act, the licenses were to be subject to "such further conditions . . . as the Commission shall prescribe in conformity with this Act . . ." Justice Douglas found that the condition in suit was prescribed in conformity with the Act because §4 (g) of the Act stated that the Commission could issue such order as it may find "appropriate, expedient, and in the public interest to conserve and utilize the . . . water-power resources of the region," and because §10 (a) charged the Commission to decide that a project must be "best adapted to a comprehensive plan . . . for the improvement and utilization of water power development, and for other public uses." The Court concluded that the granting to a public utility of permission to use the public domain on the condition that it transmit Government power with its excess capacity, might, on the facts of a case, well be required for proper conservation and utilization of water-power and could not be said to be beyond the Commission's authority.

F. DONALD ARROWSMITH, ETC. V. COMMISSIONER OF INTERNAL REVENUE

(November 10, 1952)

The Court in this case evidenced continuing differences in view on the respect to be accorded Tax Court determinations. The petition for certiorari was brought to the Court on behalf of two taxpayers who in 1937 had liquidated a corporation in which they had equal stock ownership. Liquidating distributions were received in 1937, 1938, 1939, and 1940. Profits thereby acquired were reported as capital gains. In 1944 judgment was rendered against the old corporation, which petitioners, as transferees of the corporation's assets, were required to pay. They treated their payment as an ordinary business loss. The Commissioner, however, viewed the payment of the judgment as part of the entire liquidation transaction and classified it

as a capital loss. The Tax Court upheld the taxpayers. The Court of Appeals for the Second Circuit reversed.

The decision of the Court of Appeals was affirmed by a Court which divided 6–3. Justice Black wrote for the majority and held that the losses were capital losses under the Internal Revenue Code. The loss resulted from the taxpayers' liability as transferees of the corporation's assets, which liability was based on the liquidation and not on any ordinary business transaction. Under §115 of the Code, liquidation distributions are treated as "exchanges." Hence, the loss resulted from an exchange of a capital asset and was a "capital loss" under §23 of the Code.

Justice Black denied that his conclusion conflicted with the principle that each taxable year must be considered as a separate unit for tax accounting purposes. That principle, he stated, did not prohibit consideration of all the events in the liquidation transaction from 1937 to 1944 in order to classify the 1944 loss for tax purposes so long as the returns from 1937 to 1940 were not reopened or readjusted.

Justice Jackson, joined by Justice Frankfurter, dissented. He was wary of the "plain meaning" approach of Justice Black and pointed out that the Internal Revenue Code was interpreted differently by the Tax Court and by the Court of Appeals for the Third Circuit. Finding the statute indecisive, finding the equities weighing fairly evenly and finding the effect on national revenue impossible to predict, Justice Jackson would have deferred to the Tax Court which, in a case where the importance of the holding lay in its congruity with the general structure of the tax law, "is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs."

Justice Douglas dissented on the ground that the Court's opinion violated the principle that each year is a separate unit for tax accounting purposes. He would apply the principle strictly, so that if there were no capital transactions in the year in which the loss occurred, there could be no capital loss in that year.

Committee Report

COMMITTEE ON MUNICIPAL AFFAIRS

REPORT ON OFFICE OF COMMISSIONER OF INVESTIGATION

This Committee has been instructed to inquire and report as to the propriety and desirability of any changes in the provisions of the City Charter or the Administrative Code regarding the status or functions of the Commissioner of Investigation of the City of New York and particularly as to reports by the Commissioner to the Mayor.

The Committee has consulted with several former Commissioners of Investigation and with others having special familiarity with the problem.

Chapter 34 of the 1938 Charter is entitled "Department of Investigation," and provides:

801. Department: commissioner.—There shall be a department of investigation the head of which shall be the commissioner of investigation who shall be appointed by the mayor. He shall be a member of the bar of the state of New York in good standing.

802. Deputies.—The commissioner may appoint two deputies, either of whom may, subject to the direction of the commissioner, conduct or preside at any investigations authorized by this chapter.

803. Powers and duties.—The commissioners:

1. Shall make any investigations directed by the mayor or the council.

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the ctiy, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency.

804. Complaint bureau.—There shall be a complaint bureau in the department which shall receive complaints from the public.

805. Conduct of investigations.—a. For the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter, the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths and to examine such persons as he may deem necessary.

b. The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearings, receive evidence and preside at or conduct any such study or investigation.

The only relevant provision of the Administrative Code is Section 803–1.0, which provides:

803–1.0. Reports of Commissioner.—The commissioner shall report:

1. To the council, the results of any investigations directed by the council.
2. To the mayor, the results of all other investigations.

From the time when the office of the Commissioner of Accounts was first established by the Charter of 1873 as an office of auditors and public overseers guarding against the fraudulent disbursement of the City's funds by the Comptroller and the Chamberlain, the functions of what is now the Department of Investigation have been repeatedly modified and substantially widened. During the second decade of the existence of the office, the Commissioner of Accounts became in effect "the Mayor's eye," serving principally as a means by which the Mayor could privately obtain accurate information and thus supervise the operations of the city government more effectively. The relation between the Mayor and the Commissioner of Accounts thus became one of special personal confidence; indeed, the Commissioners of Accounts were at that time the only department heads removable at the Mayor's pleasure.

During the following decades and until the time of World War I, the office became an active staff agency of the Mayor, investigating all phases of the city government and making numerous recommendations for the guidance of the Mayor and his Commissioners. But the office was then permitted to degenerate, under mediocre administration, into a mere routine of auditing and nominal performance.

The Charter of 1923 reflected the desuetude into which the office had fallen, by confining the functions of the Commissioner of Accounts to routine investigation of financial transactions and such additional inquiries as might be directed by the Mayor alone. Even the express power to conduct such "other investigations as he may deem for the best interest of the City" was limited by judicial decision to the examination of the accounts and methods of City departments.

The City Charter provided, during this period, that reports of investigations be submitted to the Board of Aldermen as well as to the Mayor. The requirement was studiously ignored on the ground that compliance would give warning to malefactors and, by making the reports public records, would unfairly publicize irregularities committed without thought of wrong.

When the 1938 Charter was under consideration, various proposals were made with a view to changing the status of the Commissioner of Accounts from that of "the Mayor's eye." There were proposals for appointment of the Commissioner by the Council; severance of all connection between the Commissioner and the Mayor; and various other suggestions for institution of investigations and distribution of reports. These ideas did not prevail. Only the provision that the Council as well as the Mayor be authorized to direct

investigations has survived, and that authority has been exercised in no more than one instance.

It is worth noting that while Section 892 of the Charter requires an annual report by each city department and the Department of Investigation published an annual report in 1938, no annual report has ever been issued since.

It is the opinion of this Committee that no change ought to be made in the present method of appointment of the Commissioner. The Commissioner is not wholly a mere confidential staff agent of the Mayor, in view of Section 803 (1) of the Charter and Section 803–1.0(1) of the Administrative Code. Those provisions represent an effort of the 1938 Charter to broaden the responsibility of the Commissioner. Basically, the Commissioner is and should be a staff assistant of the Mayor. The quality of the City's administration is and should be the responsibility of the Mayor. Giving the Commissioner a quasi-independent status would interfere with the effective performance of the duties of a well-intentioned Mayor and would furnish one who is not well-intentioned with an opportunity to evade his proper responsibility.

The Committee has concluded that a legislative requirement that reports of the Commissioner be public documents, in the sense that they would be available for general inspection as soon as rendered, would tend to hamper unduly the proper functioning of his Department. In many cases, it appears that inefficiency could be corrected by proper action by the Mayor without the loss of morale in the affected department which would inevitably follow publication. Moreover, it might well be that erroneous, trivial, or incompletely explored information might be unfairly exploited by political opponents.

The Committee is also persuaded that it would be unrealistic to require that all reports to the Mayor or reports to the Commissioner from within his Department be in writing.

RECOMMENDATIONS

The problem of actual suppression of reports can best be dealt with by the nomination and election of public officials having a proper regard for their duties. The observance of certain standards of performance by the Commissioner and his Department might, however, properly be required by amendment to the Charter of the Administrative Code, and would minimize the probability of such suppression.

a) The Complaint Bureau of the Department of Investigation now maintains a register of complaints. That register should be required by law to list every complaint received and every investigation ordered by the Council or the Mayor. Like an attorney's docket or office register, it should be required to record as permanent entries the date of receipt of a complaint or an order to conduct an investigation; the identity of the person with whom the matter originated, if known; the date of commencement of the investigation; the action taken; the substance of any report or recommendation, and the ultimate disposition or recommendation.

b) Moreover, it seems desirable that the Commissioner of Investigation be required to make public annually a list of investigations conducted during each year which uncovered substantial evidence of corruption or wilful misconduct, together with the action recommended by him. It also seems desirable that the Commissioner be required to submit to the Mayor or the Council, as the case may be, a written report of any investigation in which such evidence is disclosed.

For the rest, the proper performance of their duties by public officials can be dealt with by certain existing and proposed remedies of more general application: taxpayers' suits; legislative and executive investigation by state officials; summary inquiries by Supreme Court justices; and investigations by grand juries, district attorneys, the City Comptroller, and the projected "watch-dog" grand jury.

The Committee desires to acknowledge its indebtedness to Mr. James L. Adler, Jr. for his very substantial and able assistance.

Respectfully submitted,

COMMITTEE ON MUNICIPAL AFFAIRS

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The Library

SIDNEY B. HILL, *Librarian*

PUBLICATIONS ON LEGAL AID—1950 TO DATE

In connection with the 1952 campaign of the Legal Aid Society —"that justice shall not be rationed"—the library staff has arranged an historical exhibit of legal aid material. Among the interesting items displayed are the proceedings of the German Legal Aid Society, which preceded the present local society. The exhibit is supplemented by memorabilia from the collections of Allen Wardwell and Harrison Tweed, former presidents of this Association and the Legal Aid Society.

This checklist has been compiled by James L. Adler, Jr., Association of the Bar Fellow, with the assistance of the reference staff.

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